United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 11, 1997

TO : B. Allan Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Team Mechanical
Case 27-CA-14579

512-5009-0100
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512-5030-8001

This Bill Johnson's[1] case was submitted for advice on whether the Employer violated Section 8(a)(1) by filing a counterclaim to the Utah state court lawsuit filed by union organizer/discharged employee Edward B. Armour, and by propounding certain questions to Armour during discovery proceedings in connection with his state court lawsuit.

FACTS

The Employer is a non-union sheet metal contractor who hired Armour, a paid organizer for Local 312 of the Sheet Metal Workers International Association (the Charging Party herein), on or about April 3, 1995. It appears that at the time of his hiring, the Employer was unaware of Armour's then-current employment as a paid union organizer, since Armour had failed to include this information on his employment application. Soon after he commenced his employment, Armour began his organizing activities including engaging in a one-man alleged ULP strike against the Employer. The Employer ultimately fired Armour on April 13, 1995. The stated reason for the discharge was Armour's alleged falsification of his employment application.

Armour filed an unfair labor practice charge and the Region issued a Consolidated Complaint on May 31, 1995 alleging, inter alia, that the Employer's discharge of Armour violated Section 8(a)(3). Meanwhile, on or about

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[1] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

May 17, 1995, Armour filed a Utah state court lawsuit alleging that the Employer, by firing him, breached its promise allegedly contained in a letter dated April 10 to the effect that it would not fire him for alleged violations of company policy if he returned to work from his unfair labor practice strike. These alleged policy violations included Armour's having falsified his employment application by omitting any mention of his employment with the Union.

Subsequently, on December 28, 1995, the Employer filed an Answer and Counterclaim to Armour's state court lawsuit. The counterclaim alleged as follows:

> 1. Edward B. Armour is an agent and employee of the Sheet Metal Workers International Association Local Union 312.
>
> 2. Mr. Armour is engaged in a pattern and practice, the purpose of which is to do economic injury to Team Mechanical, Inc. and to harass, intimidate, and otherwise wrongfully disrupt and interfere with the operation of Team Mechanical's business.
>
> 3. This action has no basis in fact or law, and has been commenced and is being maintained by Mr. Armour for a wrongful purpose and in bad faith in violation of Utah Code Annotated s78-27-56(1953)(as amended).
>
> WHEREFORE, Team Mechanical, Inc. hereby demands that judgment be entered in its favor and against Edward B. Armour under Utah Code Annotated s78-27-56, and that Mr. Armour be ordered to pay to Team Mechanical, Inc. an amount equal to all costs incurred by Team Mechanical in defense of Mr. Armour's claim, including a reasonable attorney's fee together with all other relief this Court deems just and appropriate under the circumstances of this case.

The instant charge, filed on May 20, 1996, alleges that this counterclaim is unlawful under Bill Johnson's, supra, and its progeny. Later, on July 26, 1996, the Judge presiding over the state court lawsuit ruled that the

Employer's counterclaim was premature and thus was not a valid counterclaim inasmuch as the original action had not yet terminated in the Employer's favor. The Judge then simply considered the content of the would-be counterclaim to be appropriate matters for the defense of the Plaintiff's (Armour's) claim. Also, the Judge ruled that the defendant (the Employer) "should be allowed to pursue discovery bearing on the questions whether Plaintiff [Armour] has brought this action with malice or in bad faith." Then the Judge set out in some detail the parameters of discovery he saw as permissible, as follows:

> Accordingly, the Court grants Plaintiff's request as to inquiries into matters and conduct relating to Plaintiff's actions, purposes or objectives in filing a complaint against Defendant with OSHA or with the NLRB. Defendant may, however, pursue discovery as to Plaintiff's training and education for work as a union organizer, his employment by and pay from the Union, the instructions given him by the Union and his union duties at[sic] they relate to Defendant, payment of his attorney fees and court costs, information relating to any program of the Union utilizing legal process to achieve the objectives of the Union as they relate to the Defendant, statements made by him in reference to Defendant, its employees or its management, other civil actions which may have been brought by him against an employer, and any other matters which bear directly on the relationship between him as a union employee and Defendant, inquiry into which is likely to produce admissible evidence on the issues of Plaintiff's claimed malice or bad faith, or are reasonably calculated to lead to the discovery of admissible evidence on those issues.

Subsequently, on December 27, 1996, the same state court Judge reversed himself and ruled that the scope of discovery allowed by his earlier order was too broad because treating all or most of the issues raised in the Employer's counterclaim as issues appropriate for defense to the lawsuit was unwarranted. The Judge went on to narrow the scope of defendant's discovery by restricting it to the following:

1. Details of Plaintiff's employment by the union, including his length of time with the union, his salary and like matters;

2. The circumstances under which, as a union employee, he became involved with Defendant and at whose direction he did so;

3. Who it is in the union that has given him instructions or directions as to his procedure in his relations with Defendant in such matters as applying for employment with Defendant, going out on strike, returning to work, filing his suit, and like matters, and the role or authority of that/those person(s);

4. Plaintiff's failure to disclose his union employment with Team;

5. Details about the payment of his attorney fees and court costs; and

6. Any other matter closely related to the cause of action set forth in the Complaint or a legal defense thereto.

Meanwhile, in February of 1996, before even the Judge's first ruling on the scope of discovery, during pre-trial discovery proceedings in connection with the state court lawsuit filed by Armour, the Employer exercised its right under the Utah Rules of Civil Procedure to depose Mr. Armour and, inter alia, asked him various questions relating to his organizational activities at the Employer. This questioning of Armour, without the Employer having

first given him the standard Johnnie's Poultry[2] assurances, is alleged to be violative of the Act.

Specifically, the following questioning took place regarding a meeting attended by the Employer's labor counsel and other employers--a meeting that later became the subject of another unfair labor practice charge, Case 27-CA-14137, filed by Armour against the Employer and ultimately dismissed by the Region:

> Q (By Mr. Price) You weren't in attendance at the meeting that you reference in the chart [sic], were charge [sic]?
> A No.
> Q What is the basis for your knowledge of what may or may not have been said at that meeting?
> A The testimony of another organizer who was present at the meeting.
> Q Can you identify that organizer, please?

Another series of questions took place regarding conversations Armour had with the Employer's employees, which subject was apparently gotten into because of Armour's response to a question as to why he had not listed his then-current employment as a Union organizer on the application that he filed with the Employer. Thus:

> Q So you were employed as an organizer for Local 312, were you not, on the day you applied for work at Team Mechanical?
> A Yes, I was.
> Q And that employment is not listed here in your application?
> A That's correct.
> Q And can you tell me why it wasn't listed?
> A I believed I would be discriminated against.
> Q What led you to believe that?
> A Other conversations that I had had prior with Team Mechanical employees.
> Q Can you identify those employees?
> A Not all of them. Some of them I could. But I

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[2] Johnnie's Poultry, 146 NLRB 770 (1964).

hoped that that [sic] won't come to any harm to them for me identifying who I have spoke [sic] to before.

Q Would you please identify the employees with whom you spoke.

A Well, I have talked to Leon Losee before. I have talked to and heard about conversations with others, Mike Evans. Not everyone that I know their name, but other people who have come in to the union hall.

Q Is it your testimony that Leon Losee told you that Team Mechanical would discriminate against you if you told them you were union?

A No, but what was relayed to me and had heard before was that they had a very anti-union opinion up there.

Q And who told you that?

A It was several. Like I say, I had heard it from Leon before. I had heard it from any number of people. It was common knowledge.

Q Leon Losee told you that there is an anti-union sentiment at Team Mechanical?

A I have heard that from him before.

Q When and where?

A Well, this was even before I had gone to work there. And I don't remember the exact dates and times.

Q What were the circumstances?

A I just happened to be in the union hall paying dues.

Q And Leon Losee was in the union hall paying dues?

A No. No, but he was in the--there was a [sic] occasion where he came in to talk to the business manager about things going on up there, and just a general wondering what was going on with the local. There was also a number of other employees that did the same thing from time to time.

Q Do you recall when in relationship to March 2nd, 1995 that conversation took place?

A This would have been a year or two prior.

Q Did you have any conversations between November of '94 and March the 2nd of '95 with any employees of Team Mechanical or anybody else regarding the anti-union sentiment at Team Mechanical?

A Possibly. I can't recall specific times.

Still another area of concern in this regard were two items requested by Employer's attorney in an overall request for documents made on February 20, 1996:

> Item 14: All audio recordings of conversations, meetings, discussions or other communications between you and any person employed by or affiliated with Team Mechanical, Inc., including but not limited to Larry Smith.
>
> Item 15: All documents which constitute, relate and/or refer to communications between you and Team Mechanical Inc. or any management employee of Team Mechanical, Inc.

Lastly, there is the questioning of Armour regarding his activities at the Employer's facility on April 13, 1995, one of which activities concerns a Board complaint allegation regarding the alleged disparate maintenance of the Employer's solicitation policy. The questioning in this regard proceeded as follows:

> Q What happened after April the 12th?
> A Well, when I came in April the 13th, it was a Thursday. I came [sic] a little early. And upon advice of counsel, I was exploring the options available to me and under my rights under the law with regards to solicitation and distribution of literature.
> I checked out their company bulletin board. I found the United Way poster where they were soliciting other items. And I had a little disposable camera with me, so I took a couple of pictures of the bulletin board.
> Steve Blakeley came down. He was surprised about that.
> And he told me not to take any pictures of the production area. I told him I wouldn't. And I did not.
> I punched in at 6:00, started working on the Robinson Mill job. Chris Duncan was the team leader there. He had seen me taking pictures of the office and of the bulletin board right next to the office. He
> ran and jumped on the phone.
> I have a few other notes here about--even when I

took bathroom breaks, I was working with Don Manning that morning, making a few comments about--in my notes about him being there. I noticed a lot of new employees that day. Some weren't there that I had been working with all along. Others were brand new, ones I hadn't recognized before. And I was just trying to identify and introduce myself to them.

Basically I had a pretty good day working. I saw Bob Hartman down there. I overheard him telling anti-union stories. From what I understand, he had only ever worked--not only ever--but he typically worked upstairs, and all of a sudden he was down on the shop floor telling stories about the union.

Then anyhow, shortly before quitting time, I had a conversation with Ross Wilson, and he relayed some more anti-union stuff from Ted Taylor to me. And then at 4:30, right at--right at quitting time, that's when Larry asked me back in to his office. And he had Steve Holbrook in there and Nick Toulatos who I hadn't met before. And basically the meeting was short and sweet. They told me that all of a sudden, despite their earlier assurances, that I was being fired for omitting the organizing job on the employment application. I asked Larry for a letter to that effect.

Q Let me stop you right there.

A Okay.

Q Somebody told you that despite other assurances, you were being terminated, somebody said that to you at that meeting? Or is that your characterization of the meeting?

A That's how I recall the meeting.

ACTION

The Region should issue complaint, absent settlement, alleging that the Employer's counterclaim against Armour was baseless and retaliatory against his Section 7 activity. In addition, the Region should allege that certain of the questions posed to Armour during the

Employer's discovery efforts went beyond what was arguably relevant to the preparation of its defense to the civil action, and therefore, violated the Act.

1. The Legality of the Counterclaim.

In Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), the Supreme Court ruled that the Board may not enjoin an ongoing lawsuit that has a reasonable basis, i.e., raises genuine issues of law or fact, even if the suit was filed to retaliate against activities protected by the Act. Where the Board is unable to conclude that the suit lacks a reasonable basis, it should "proceed no further with the ... unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded."[3] If judgment goes against the charged party in the state court, or if the suit is withdrawn or otherwise shown to be without merit, the Board may then proceed to adjudicate the unfair labor practice case.[4]

The Court in Bill Johnson's made clear that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law."[5] Thus, if the state court lawsuit at issue is not preempted by federal law, has no illegal objective, and cannot be shown to lack a reasonable basis, the proper procedure is to hold in abeyance any charges alleging the lawsuit to be unlawful until the state court determines the merits of the suit.

Initially, we conclude, in agreement with the Region, that the Employer's counterclaim was baseless. This is manifestly so since the Utah judge in effect dismissed it as untimely. We also conclude that the counterclaim was filed in retaliation against Armour's activities protected by the Act.

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[3] 461 U.S. at 746.

[4] Id. at 747.

[5] Id. at 737 fn. 5.

The counterclaim itself alleged, in paragraphs 1 and 2, that Armour is an agent and employee of the Union and "is engaged in a pattern and practice, the purpose of which is to do economic injury to [the Employer] and to harass, intimidate, and otherwise wrongfully disrupt and interfere with the operation of [the Employer's] business." These allegations fairly encompass many activities that are protected by the Act and which could still be said to "interfere with the operation" of the Employer's business. For example, Armour's unfair labor practice strike on or about April 10, 1995 would be clearly encompassed by the language of the counterclaim. Accordingly, we conclude that the Employer filed its counterclaim in retaliation against Armour's protected organizing activities.

The Employer may argue that its counterclaim was attacking only Armour's unprotected conduct, in particular his bad faith in bringing the state court lawsuit. Indeed, a fair reading of Utah Code sec. 78-27-56 strongly suggests that recovery thereunder is limited to reasonable attorney's fees to a prevailing party only if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith. However, as noted above, the Employer's pleadings arguably go well beyond Armour's action in bringing the state court lawsuit, and also constitute an attack on his protected organizing activities at the Employer in general. In sum, the counterclaim as explicated by the allegations of paragraphs 1 and 2 is baseless, retaliatory and thus unlawful under Bill Johnson's.

We also conclude that since the counterclaim is unlawful as baseless and retaliatory, it is unnecessary to argue that portions of the counterclaim, as alleged, are also unlawful as preempted.

The maintenance of a preempted lawsuit, once the General Counsel has determined that the suit is preempted by issuing complaint, violates Section 8(a)(1) even absent any showing that the suit had a retaliatory motive and was baseless.[6]

The Supreme Court has set forth several guidelines for determining the scope of NLRA preemption. Thus, in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959), the Court held that when "it is clear or may fairly be assumed that the activities are protected by Section 7 . . . or [prohibited] by Section 8," or even "arguably subject" to those sections, the state and federal courts are ousted of jurisdiction, and "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The Court then set out two exceptions to this rule: there is no preemption where the activity challenged in another forum is of merely peripheral concern to the NLRA or where it touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." 359 U.S. at 243-244. [Footnote omitted.] Under this standard, the Court has upheld state regulation of "malicious" libel based on statements made during a labor dispute even though such statements were arguably regulated by the Act. Linn v. Plant Guard Workers, 383 U.S. 53, 64-65 (1966).[7] The Court has also held that the Act does not preempt state jurisdiction to enforce its laws prohibiting violence,[8]

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[6] Loehmann's Plaza, 305 NLRB 663 (1991); Bill Johnson's Restaurant, 461 U.S. at 737 fn. 5.

[7] The Supreme Court made clear that in the context of labor speech, the term "malice" denotes the test enunciated in New York Times v. Sullivan, 376 U.S. 254, 280 (1964), that is, with knowledge of the falsity of the defamatory statements or with reckless disregard for their truth or falsity. Linn v. Plant Guard Workers, 383 U.S. at 65. See also Letter Carriers v. Austin, 418 U.S. 264, 280-282 (1974) (lower court erred by instructing jury that it could find liability for libel in a labor dispute if it found defamatory statements were made with malice in the common law sense of hatred, ill will, or personal spite).

[8] Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954)(threats of violence).

obstruction of access to property,[9] and the intentional infliction of emotional distress.[10]

Here, a portion of the activity that the counterclaim arguably attacked--Armour's attempts to organize the Employer's employees--is clearly subject to Sections 7 and 8 of the Act. That activity can hardly be considered to be of only "peripheral concern to" the Act or "deeply rooted" in local law. Cf. Belknap, Inc. v. Hale, 463 U.S. 491, 498-99 (1983). Therefore, to this limited extent these allegations of the counterclaim arguably are preempted.

On the other hand, the counterclaim also alleges that Armour filed his suit for a wrongful purpose and not in good faith. We would not argue that Utah does not have a "deeply rooted" interest in protecting the processes of its own state courts from bad faith lawsuits. Thus, that portion of the Employer's counterclaim would not be preempted. Since only a portion of this counterclaim arguably is preempted, and the entire counterclaim is unlawful as baseless and retaliatory, we conclude that it is unnecessary to also argue preemption in this case.

2. The questioning of Armour during the state court discovery proceedings.

Under Johnnie's Poultry, supra, an employer who is preparing its defense to pending unfair labor practice proceedings may inquire into the Section 7 activities of employees if the employer gives certain assurances to the questioned employees. However, in Maritz Communications Co., 274 NLRB 200 (1985), the Board set forth an exception to the necessity for giving those assurances. In Maritz, the charging party had filed both an unfair labor practice charge and a civil lawsuit in federal court alleging a violation of the state (Michigan) age discrimination statute. During depositions for the civil lawsuit, the employer asked the charging party about his Board charge and also about his relationship with the union.

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[9] Automobile Workers v. Russell, 356 U.S. 634 (1958).

[10] Farmer v. Carpenters, 430 U.S. 290 (1977).

As set out in the ALJ's decision in Maritz, respondent's counsel interrogated the charging party "extensively concerning various aspects of the instant proceeding (then pending before me), including [charging party's] transactions, written communications and statements, and even conversations, between him and the Board's counsel handling the instant proceeding before me, in respect to the instant proceeding." 274 NLRB at 211 (emphasis in original). The ALJ concluded in Maritz that the respondent's "far-roving interrogation" in significant aspects "so far exceeded any reasonably relevant trial preparation needs of the case in which it occurred", that it therefore constituted coercive interrogation into Section 7 activities in violation of Section 8(a)(1).

The Board reversed the ALJ and found no violation even though no Johnnie's Poultry assurances had been given. The Board held, contrary to the ALJ, that the respondent's examination of the charging party was within the scope of arguably relevant questioning permitted by the Federal Rules of Civil Procedure, under which the employer had the right to inquire into "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[11] The Board noted that the unfair labor practice charge alleged discrimination against union activity. The Board therefore concluded that the deposition questions concerning the alleged union discrimination necessarily also concerned matters "relevant to the preparation of a defense" against alleged age discrimination. In other words, if the Board case was meritorious and the employer had discriminated against union activity, this necessarily could help the employer establish that it had not discriminated because of age.[12]

In our case, until the state court Judge issued his latest ruling on December 27, 1996, regarding the proper scope of discovery, the allegation concerning the discovery

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[11] Maritz Communications Co., 274 NLRB at 201.

[12] Id., at 202.

interrogation of Armour arguably fell under the reasoning of Maritz. In that case, where the federal suit and the unfair labor practice case arguably were inconsistent, discovery into the Board case was relevant to the federal case. In our case, Armour's unfair labor practice charge, alleging that the Employer discharged Armour in retaliation against his Union activity, similarly is arguably inconsistent with and undermining of Armour's state court claim.

In the Board case, Armour alleged, inter alia, that the Employer fired Armour because of his Union activities.[13] Thus, for Armour to prevail in the Board case, the evidence must show that his alleged falsification of the employment application was pretextual and not the real reason for his discharge. Conversely, for Armour to prevail in his state court lawsuit, he must prove the opposite, i.e., that he was discharged because he falsified his employment application, in contravention of the Employer's alleged promise not to do so.

Consequently, here, as in Maritz, Armour's claim in the civil lawsuit may be inconsistent with his claim before the Board (and before OSHA). Therefore the questioning of Armour regarding his union activity (and OSHA-related activity) would be at least arguably relevant for the Employer to establish, in defending the civil lawsuit, that falsification of his employment application was not the real reason that Armour was fired. Accordingly, the facts as well as the reasoning of Maritz appear to support the conclusion that most of the Employer's discovery efforts in the state court proceeding was relevant to that suit and not unlawful.

We note that Maritz involved a federal suit and the Federal Rules of Procedure. However, Advice has applied the reasoning of Maritz to state court proceedings.[14] In

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[13] We also note that Armour alleged in his OSHA complaint that he was fired for filing safety complaints against the Employer.

the instant case, most of the Employer's questions appear to be relevant to the lawsuit, including its defenses to the lawsuit, and also were propounded during discovery in that suit.

We conclude, however, there were certain areas of the Employer's questioning that were not relevant, and thus were unlawful interrogations, in view of the judge's latest ruling, and in view of the inherent admonition in Maritz to the effect that to be lawful the questions must be "relevant to the preparation of the defense.".

The first series of questions, set out above in the statement of facts, relate to allegations in the dismissed unfair labor practice charge in Case 27-CA-14137. None of that questioning is covered by the judge's latest scope-of-discovery ruling. Therefore it was unlawful for the Employer to have asked those questions.

The second area of questioning concerned conversations with the Employer's employees, and the third area concerned the requests for audio recordings and documents relating to conversations with the Employer's employees. The first four questions appear to be encompassed by the Judge's ruling, which expressly permitted discovery into Armour's "failure to disclose his union employment...." These initial questions related to the fact that Armour was a union organizer at the time he applied for work and that that employment was not noted on the application. The remainder of that line of questioning, as well as the requests for audio recordings and documents relating to conversations with employees, does not appear to fall within the judge's latest ruling. Therefore these questions were not "relevant to the preparation of a defense" to the civil suit and were unlawful interrogations.

On the other hand, since the facts show that April 13 was the date of Armour's discharge, the question of "What happened after April the 12th" appears to be relevant. The fact that Armour chose to answer that question with a five paragraph soliloquy was not the Employer's fault.

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[14] Kotecki Monuments, Inc., Case 8-CA-21736, Advice Memorandum dated Sept. 12, 1989.

Employer's counsel was not duty-bound to cut Armour off, especially since the Employer was engaged in discovery and could not tell where Armour was going until he got there. To in effect ask the witness what happened on the day that he was fired, in the circumstances of the issues in the was lawsuit, was not irrelevant.

Recapitulating, there is no claim or evidence that the Utah Rules of Civil Procedure do not adequately protect deposed witnesses. Moreover, Armour's attorney was present and had every opportunity to protect Armour's interests during the deposition by instructing him not to answer certain questions. Indeed, Armour's attorney did just that in several instances. In addition, the Employer can be expected to argue that arguing a violation would in effect be asking the Board to engraft the Johnnie's Poultry safeguards onto the Utah Rules of Civil Procedure. Arguably, the Board has no such authority in situations, as here, where the state judicial system appears to provide adequate safeguards for deposing witnesses. Hence, under Maritz, the fact that the Johnnie's Poultry safeguards were not given is not, in and of itself, sufficient to establish a violation of the Act. Here, as in Maritz, it is the Employer that is in the civil forum against its will and trying to defend itself in a lawsuit brought by the employee. As the Board in the last sentence of Maritz, noted, "[b]ecause [the charging party] filed the lawsuit in which he was deposed, he must or should have been aware that the defendant could examine him concerning any matter relevant to the preparation of a defense to the civil suit."[15] What the Board seems to be implying in Maritz, is that unless the defendant inquires into irrelevant matters in its discovery efforts, the Board is not going to intervene, especially since the interrogated employee voluntarily subjected himself to being in the position he now finds himself. Here, it is precisely because the defendant has inquired into irrelevant matters, as confirmed by the Judge's ruling, that some of the questioning noted above is unlawful.

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[15] Maritz Communications Co., 274 NLRB at 201-202.

B.J.K.